JAN 2 1 19
HAROLD B. WILLE

IN THE

SUPREME COURT OF UNITED STATES

OCTOBER TERM, 1955

No. ~~579~~ 21

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION,

Petitioner,

GILBERT S. PARNELL

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

B. B. McGINNIS
ATTORNEY FOR RESPONDENT
Gilbert S. Parnell

Suite 1109 Park Building,
Pittsburgh 22, Pa.

INDEX

PAGE

Arguments in Behalf of Gilbert S. Parnell 1

STATUTES CITED

Judicial Code U. S. C. A. Section 1652, Federal Rules Decision 2

Section 59, Pennsylvania Negotiable Instruments Law, Act of May 16, 1901, P. L. 194, P. S. Title 56, Section 139 2

CASES

Clearfield Trust v. U. S. 318 U. S. 363; Erie R. R. v. Thompkins, 304 U. S. 64 4

Graham v. White Phillips, 298 U. S. 27 7

Gruntal et al, v. National Security Co., 173 N. E. 682 (N. Y. Court of Appeals) 7

National Bank of Commerce v. Seattle National Bank, 187 Pacific 342 8

Shammas v. Boyett, 249 Pacific (2) 880 7

South Boston Trust Co. v. Levin, 143 N. E. 816 7

Wells Fargo Bank v. Bank of Italy 4 P. (2) 781 8

TEXT BOOKS

Beutel's Brannon, Negotiable Instruments Law, 7th Edition, Page 108 8

Britten's Bills and Notes (1943) Page 1035 7

Daniels Negotiable Instruments 7th Edition, Page 122 8

ARGUMENT

It will be noted that although these cases against the four original defendants were tried together for the sake of convenience, they were separate and distinct suits, and when appeals were taken by the present defendants, First National Bank in Indiana and Gilbert S. Parnell, they took separate numbers in the Court of Appeals for the Third Circuit, and the petitions for the writs of certiorari filed by the plaintiff below show that situation as continuing.

As to the other defendants, the Federal Reserve Bank of Cleveland and Arthur Rocco, this issue has been finally determined. Although there was a verdict against Rocco in the court below, no appeal was taken. At the conclusion of the plaintiff's testimony, the trial judge granted the defendant, Federal Reserve Banks, motion for a voluntary dismissal with prejudice for the reason that the said bank was an arm of the Federal government. With this action of the court, we were and still are in complete accord, but not for the reason assigned by the trial judge. The defendant, Federal Reserve Bank, is a corporation and may sue and be sued as a defendant and likewise it is not immune to suit because it appears to be an arm of the Federal government. The United States and any of its dependent branches may be sued, in like manner as a private concern or individual, and this is an almost daily occurrence. (recently Dickson-Yates).

The Federal Reserve Bank was entitled to an involuntary dismissal with prejudice because in redeem-

ing the bonds, it was performing a solely ministerial act; one that it was bound to do under the rules and regulations of the Treasury Department, governing such redemptions. The complaint alleged conversion and no such an offense was proven. When the bonds were presented after being called for redemption, the bank had no alternative but to pay in accordance with the tenor of the bonds and the treasury regulations. It could not negotiate, it could not bargain, it could not fix the price, nor could it refuse to redeem. There was nothing in the record to justify the suit as to the Federal Reserve Bank unless it was the notice it had received that the said bonds were missing or stolen, some four and a half years prior to the actual redemption.

The Plaintiff's position in support of its petition for a certiorari is that in entering a judgment for the Indiana bank, the Court of Appeals, Third Circuit, violated Federal rules of Decision 28 U. S. C. Sec. 1652 and Section 59 of the Pennsylvania Negotiable Instruments Law (Act of May 16, 1901, P. L. 194, P. S. 56, Sec. 139), both of which may be found in petitioners argument, Appendix A, page 28 and which for the sake of brevity will not be here quoted.

These same statutes are also cited in support of the writ of certiorari against Gilbert S. Parnell although as to him no final order was entered by the Court of Appeals. A new trial was granted to him and this is purely an interlocutory order. We have always understood that such an order, being interlocutory cannot be successfully appealed, and if that rule is sound, it should end this matter as to Parnell and the petition

for the writ should be dismissed. Furthermore the granting or not granting of a new trial is a discretionary matter and a court may not be convicted of error in the granting or failing to grant such a motion in the absence of a clear abuse of discretion. We submit that no such situation presents itself in the instant case.

We have had the advantage of reviewing the answer of the First National Bank in Indiana, plaintiff, in opposition to plaintiff's argument and to the part thereof dealing with situations and conditions under which writs of certiorari have been allowed and refused. We believe it covers that phase of this particular issued and adopt it as our own.

As to the Federal rules of Decision (28 U. S. C., Section 1652).

A reading of the questions presented by the plaintiff (Page 2 of the petition) would indicate that no Federal question whatsoever was involved, that it was simply a question of conversion by private individuals of the property of private persons and the only reason for Federal jurisdiction was the diversity of citizenship and that therefor Federal rules of Decision and Section 59 of the Pennsylvania Negotiable Instruments Law, supra, declared the law in the case.

DOES THE FEDERAL RULES DECISION ACT APPLY?

Defendant Parnell says no. The bonds were United States government bonds. The Federal Reserve Bank of Cleveland was an arm of the government and the redemption of the bonds was carried out strictly in ac-

cordance with Circular 300, Treasury Rules and Regulations, which of course have the force and effect of law (Trial Appendix 257 (a) and 259 (a).

Erie Railroad v. Tompkins, 304 U. S. 64 (pages 7 and 20 of petition) citing Swift v. Tyson is relied upon as authority for the proposition that the laws of Pennsylvania (Section 59, Penna. Negotiable Instruments Law, supra,) control this action. We submit that case offers no field for the application of the principle here sought by the plaintiff. In the Tompkins case the plaintiff a trespasser walking longitudinally along the tracks of the defendant company in Pennsylvania was injured as a result of being struck by a loose and swinging door on one of the cars. *Under the law of Pennsylvania,* under such circumstances there was no duty owing to the trespasser by the railroad other than to inflict no wanton or intentional injury upon him. *There was no Federal law on the subject.*

A recovery was had in the United States District Court for the Southern District of New York which was sustained on appeal to the Circuit Court, and on a writ of certiorari to the Supreme Court being allowed the decision was reversed and the *law of Pennsylvania* applied because *there was no Federal law* on the subject. Of course it was impossible to prove wanton or willful and intentional acts of negligence on the part of the defendant's employees.

The instant case presents an entirely different situation. Here bonds of the United States were al-

leged to have been converted. The Treasury regulations, which have the full force and effect of law, were introduced as part of the plaintiff's case. The manner in which the bonds were deposited by the defendants for redemption were in strict accord with the Treasury Department regulations and the Federal laws.

THE PENNA. N. I. STATUTE, SEC. 59

It needs but a passing glance to establish that Section 59 of the Negotiable Instruments Law of Pennsylvania has no application whatsoever to the issue here raised. That Act provides that *every holder is deemed prima facie to be a holder in due course;* but when it is shown that the title of any person who has *negotiated* the instrument was defective, the burden is on the *holder.xxx* No one at any time during the trial of the cause or in the appellate court ever seriously charged either the bank in Indiana or the defendant Parnell with being holders for value.

The position of the defendants was that they were mere agents or conduits who deposited the bonds for redemption in strict compliance with the Treasury rules and regulations, and that neither had any interest whatsoever, in the bonds or proceeds of the redemption and were never holders for value.

In the trial appendix 260 (a) we find this statement by the trial judge:

> Plaintiff's evidence also shows defendant Parnell, the bank in Indiana, took these bonds not as holders in due course for value but as a conduit or as an agent for the purpose of passing them on

to the Federal Reserve Bank of Cleveland for redemption."

Again on page 264 (a) of the trial appendix we find this statement by the trial judge:

> "That is the crux of this case. That is what we are confronted with, the ruling that is to be made on that, the plaintiff having rested. I say very frankly if you were a holder in due course for value at this stage of the record with the proof on hand your position would be correct. I think you would be entitled to a dismissal."

The record contains other statements of like tenor by the trial judge.

Nowhere in the Complaint is there any allegation to the effect that the defendants *negotiated* the bonds in question. The only expression used is the word *converted.* In the presentment of its case to the court the court the plaintiff submitted a memorandum devoted to this proposition:

> "Plaintiff will establish (1) proof of its ownership, and (2) subsequent loss of the bonds, and (3) the receipt and negotiation thereof by the defendants a prima facie case of conversion against each of the defendants."

It is our position that negotiation of said bonds by the defendant has not been established. If this is correct, then according to its argument plaintiff has failed to make out a case because there was no negotiation of the bonds in this case. Presentment for *redemption* certainly does not include *negotiation.* In redeeming the bonds the Federal Reserve Bank was powerless to set price conditions or offer any other arguments usually

found where securities are negotiated. As heretofor suggested, it was its duty to pay in conformity with treasury rules and regulations. Had it known that the bonds had been missing or stolen, of course, it would have been duty bound to notify the proper authorities, but there are many cases where payments and redemptions of lost or stolen bonds have been made after notice of the infirmity had been received, and liability has followed.

The following cases amply sustain this proposition:

Governmental et al v. National Security Co., 173 N. E. 682 (N. Y. Court of Appeals).

Graham v. White-Phillips Co., 296 U. S. 27.

Pratt v. Higginson, 119 N. E. 661.

We do not deem that matter relevant in the present matter and therefor do not quote from the decisions.

It is respectfully submitted that according to plaintiff's own yardstick as hereinabove mentioned it failed to prove an essential part of their case; viz. the *negotiation* of the bonds in question.

> "Instruments are 'negotiated' to purchasers. Instruments are not usually negotiated to principal debtors and other payors but are delivered up, or surrendered, to the payor."

Britten Bills and Notes (1943), page 1035; *Daniels on Negotiable Instruments*, 7th Ed., 122; South Boston

Trust v. Levin, 143 N. E. 816; Shammas v. Boyett, (114 Cal App. 2d 139,) 249 P. 2d 880; National Bank of Commerce v. Seattle National Bank, 187 P. 342; Wells Fargo Bank v. Bank of Italy 4 P. 2d 781.

Beutel's Brannan, Negotiable Instrument Law, 7th Ed., page 108, is the best exposition of this proposition that have been able to find. Since it is in a textbook, we are going to take the liberty of quoting from it.

> "(b) *Cases Where the Federal Law Applies.* There is a well established field outside of the Conformity Act where the Federal Courts have never felt themselves bound to follow state statutes. The Conformity Act itself simply says: 'The laws of several states, except where the Constitution, treaties, or statutes of the United States otherwise require, or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.'
>
> "In all of those situations where Federal courts, or for that matter, state courts, deal with paper issued by the federal government or agencies created under the Federal Constitution and statutes, the cases lie outside the field of the Conformity Act, and the law in such cases flows from the Constitution, the federal statutes, delegated legislation in the form of department rules and orders, and sometimes from decisions of quasi-judicial administrative agencies. These taken as a whole may establish a set of rules completely different from those codified in the N. I. L. which has not been adopted by the Congress as a federal law.
>
> "Where all of the above sources are silent the Federal courts have consistently held that although state decisions and interpretation of the N. I. L. may be evidence of the general federal law involved, *they are not binding on the Federal Courts and they may decide the cases on what they believe to be the rules of justice in the particular*

facts citing Clearfield Trust Company v. United States, 318 U. S. 336). Thus there is a large and growing field of negotiable instruments law wholly outside the N. I. L. and the rules of uniformity which it intends to set up. (*Emphasis supplied*).

"Until Congress adopts the act, this situation may be expected to continue. The N. I. L. is, of course, part of the Code of the District of Columbia and governs commercial transactions in that area. However, it does not seem to have been applied to government business originating there and probably was not intended so to apply.

"Even if the N. I. L., or a similar uniform statute, were to be adopted by the Federal Government to cover federal and other fields where the federal law carries precedence, there would still remain the problem of reconciling results with other federal statutes and agency rulings given under proper delegation of authority. These, of course, would tend to prevent uniformity of results with cases dealing with only private commercial paper."

In conclusion we submit that the application to the issue and the sales of these United States Bonds of a state law would lead to a great diversity of rules regulating title and redemption, and would subject the entire financing plan of the Federal government to exceptional uncertainty by making identical transactions subject to the vagaries of the several states.

It is unthinkable that the law of any state could be invoked to determine any issue in which a Government bond was of vital importance. The attractiveness of these issues is primarily because of the sound value back of them, and in addition to that facility with which they may be transferred. Passing by delivery,

they are quickly convertible into cash or accepted in lieu of money and are a ready medium of exchange.

It is respectfully submitted that the writ of certiorari as prayed for should be denied.

Respectfully submitted,

B. B. McGINNIS,
Attorney for Gilbert S. Parnell,
Park Building, Pittsburgh, Pa.